CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5023

Heard in Calgary, April 9, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's discharge of C. Chisholm on August 16, 2023.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

The Grievor was hired on June 14, 2021. On or about January 28, 2023, the Grievor was arrested and charged with multiple offences under multiple sections of the Criminal Code of Canada. The Grievor failed to notify the Company of the charges against him which led to a formal investigation on July 27 and 28, 2023 into his violation of CN's Code of Business Conduct.

Following the formal investigation, the Grievor was given a CN Form 780 and was assessed a discharge on August 11, 2023, for "Circumstances surrounding your violation of CN's Code of business conduct for failure to disclose charges against you while on a Leave of absence on or about February 1, 2023, to March 10, 2023."

COMPANY POSITION:

The Company maintains that the Grievor failed to notify the Company of the charges against him in violation of CN's Code of Business Conduct.

The Company takes the position that the grievor was a CN employee subject to the terms of the Code of Conduct and he did, in fact, violate the Code of Conduct by failing to disclose his charges and therefore the discharge was warranted in the circumstances. The Company disagrees with the Unions contentions and the investigation was completed in a fair and impartial manner.

Further, the grievor definitively breached the bond of trust expected of employees especially in the context of his responsibility to disclose the charges against him.

The Company further denies the allegation that the Collective Agreement was violated or that the articles relied on by the Union are relevant or that a Remedy under Addendum 123 is applicable.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On August 16, 2023 the Company issued Mr. Chisholm a Form 780 terminating his employment for violating the Company's Code of Business Conduct for "…failure to disclose charges against you while on a Leave of Absence on or about February 1, 2023 to March 10, 2023."

The Union appealed the termination taking the position that: the Grievor was not accorded a fair and impartial investigation as required by Article 82 of Agreement 4.16 rendering the discipline imposed *void ab initio*; the Company had excessively delayed in holding the investigation and then disciplining the Grievor, also contrary to the requirements of Article 82; had not established that the Grievor was aware of the Company's Code of Conduct; and had not established the Grievor was in violation of the Code of Conduct.

The Union requests that the discipline be voided or set aside, the Grievor reinstated with compensation for all losses including wages and seniority; and such other relief as may be appropriate. Alternatively, the Union submits the discipline imposed is too severe in all the circumstances and requests the grievance be allowed on terms the Arbitrator deems appropriate.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Lennie	**(SGD.) S. Matthews**
General Chairperson, CTY–C	Manager, Labour Relations

There appeared on behalf of the Company:

S. Matthews	– Senior Manager, Labour Relations, Toronto
S. Fusco	– Senior Manager, Labour Relations, Edmonton
R. Singh	– Manager, Labour Relations, Vancouver

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY–C, Hamilton
G. Gower	– Vice General Chairperson, CTY–C, Brockville
E. Page	– Vice General Chairperson, CTY–C, Hamilton

AWARD OF THE ARBITRATOR

[1] The Grievor was a Conductor, employed by the Company since June 14, 2021. He was governed by Agreement 4.16 (Eastern Lines).

[2] The Grievor's last working trip with the Company was on August 9, 2022. On August 10–12, 2022, the Grievor booked off sick. On September 20, 2022, the Grievor provided the Company with a WSIB Form 6, alleging he sustained a workplace injury to his head on his last trip. The WSIB later determined the injuries were not suffered at work, but during a baseball game.

[3] In late January, 2023, the Grievor was allegedly involved in a home invasion and stabbing in Toronto. His name and photo were published in news media reports and the Toronto police asked for the public's assistance in locating him and a female accomplice. Those reports warned the Grievor was considered dangerous.

[4] The Grievor was not performing work for the Company at the time of this alleged criminal activity, as he was off work and receiving disability benefits.

[5] The Grievor did not disclose the charges to the Company.

[6] On August 11, 2023, the Grievor was discharged for failing to disclose criminal charges and breaching the Company's Code of Business Conduct (the "Code"). At the time of discharge, he had 15 demerits on his discipline history.

[7] The issue in this Grievance is whether the Company had just cause to discharge the Grievor.

[8] For the reasons which follow, the Grievance is dismissed. The Company had just cause to discharge the Grievor.

Facts

[9] There is a somewhat complicated timeline which surrounds these events.

[10] From August 13, 2022 to September 13, 2022 the Company received no communication from the Grievor, despite attempts to contact the Grievor. On September 14 and 15, 2022, the Grievor made contact with OHS regarding outstanding medical information to support his absences.

[11] After losing his WSIB benefits due to CN's appeal and the discrepancies earlier noted, the Grievor applied for disability benefits, which were awarded from August 10, 2022 to March 8, 2023.

[12] On January 30, 2023, the Company received information about the home invasion involving the Grievor, from news media reports. Those news reports did not mention the Grievor was employed by CN, however the Company became aware the Grievor was considered dangerous.

[13] On February 1, 2023, the Grievor was located, arrested and charged with multiple criminal offences: break and enter to commit robbery with an offensive weapon; disguise with intent; uttering threats of bodily death or bodily harm; assault with a weapon; possession of a weapon; possession of a prohibited or restricted weapon; and aggravated assault.

[14] The Grievor was in police custody from March 6–10, 2023.

[15] On March 8, 2023, Canada Life became aware of the Grievor's incarceration and closed the Grievor's benefits file.

[16] On April 10, 2023, the Company sent the Grievor a letter that he had not provided documentation to support his absence beyond November 7, 2022 despite multiple attempts to contact him, and his absence was considered unauthorized as of January 11, 2023. It was unclear why that particular date was chosen. The Grievor was asked to substantiate his absence with documentation and provide an estimated return to work date or advise of his reassessment date.

[17] On April 25, 2023, the Grievor sent an email to OHS acknowledging receipt of the Company's April 10 letter.

[18] On May 9, 2023, OHS received medical information from the Grievor's treating physician which indicated the Grievor was unable to return to work in a safety critical position.

[19] On July 10, 2023, the Grievor was sent a Notice to Appear via registered mail for an alleged violation of the Company's Code of Business Conduct "by failing to respect the law and failing to report charges against you while on a leave of absence from approximately January 28, 2023 onward." The date was rescheduled to July 27, 2023, on the Grievor's request.

[20] A formal Investigation of the Grievor was undertaken by the Company on July 27 and 28, 2023 for violation of CN's Code of Business Conduct and failing to disclose the charges against him.

[21] During that Investigation, the Grievor advised the Company he was not aware of the obligation to report his charges, as he was not aware of the Code of Business Conduct and had not received training on it.

[22] After this answer, there was a short recess while the Company obtained training logs. Those logs indicated the Grievor had received training on the Company's Code of Business Conduct when he was onboarded, as did every CN employee.

[23] After this was brought to his attention, the Grievor's position was that he had not violated the Code of Conduct as the charges did not impair his ability to perform his job, since he was off on disability during the alleged incident. The Grievor also noted that he believed

all of the charges would be dismissed, after talking with his lawyer; that he did not have access to the Code while on inactive status, and that he had not been identified as an employee of CN in the news articles, and that only his family was aware of that information.

[24] The Company ultimately discharged the Grievor on August 16, 2023 for breaches of its Code of Conduct, including failing to advise it of the criminal charges.

[25] The Union filed a Step Three Grievance on October 11, 2023. On December 5, 2023, the Company sent the Union a proposed JSI. On January 10, 2024, the Company filed a Notice to Arbitrate with the Union and the CROA office providing them with 48 hours' notice that the Company would be progressing to arbitration on *ex parte* basis. On February 15, 2024, the Grievance was scheduled to be heard in arbitration on April 9, 2024. On March 12, 2024, the Union submitted an *ex parte* Statement of Issue.

[26] On March 22, 2024, this Arbitrator issued **CROA 5000.** That decision held that the parties were required to seek the permission of the scheduled Arbitrator to proceed *ex parte,* if they had any objections regarding a lack of good faith efforts to reach a JSI, by virtue of Item 10 of the CROA Agreement.

Relevant Provisions

> *Collective Agreement*
>
> Final Settlement of Disputes – Article 84.3
>
> A grievance which is not settled at the Vice–President's Step of the grievance procedure may be referred by either party to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work.
>
> (Refer to Addendum No.22)
>
> 84.4 A request for arbitration shall be made within 60 calendar days from the date decision is rendered in writing by the Vice–President by filing written notice thereof with the Canadian Railway Office of Arbitration and on the same date a copy of such filed notice will be transmitted to the other party to the grievance.
>
> Note: in the application of this paragraph upon receipt of a request for arbitration, the Company will meet with the General Chairperson, within 30 calendar days from receipt of such request, to finalize the required Joint Statement of Issue. Failure to comply with the provisions of this paragraph will permit either party to the dispute to progress the dispute to the Canadian Railway Office of Arbitration on an "ex–parte basis" pursuant to the provisions of the Memorandum of Agreement governing the Canadian Railway Office of Arbitration.

> *CROA Agreement*
>
> 10. The signatories agree that for the Office to function as it is intended, good faith efforts must be made in reaching a joint statement of issue referred to in clause 7 hereof. Such statement shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty–eight (48) hours' notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority to grant or to refuse such application. *CROA Agreement*[1]

Arguments

[27] The Company's position was that this Grievance was properly before the Arbitrator, and that it had just cause to discharge the Grievor.

[28] Regarding the Union's preliminary objection, the Company argued the "Note" under Article 84 of Agreement 4.16 and the CROA Agreement allowed *either* party to progress grievances to arbitration on an *ex parte* basis; that the parties had a long–standing practice not to seek permission from the CROA Office for *ex parte* proceedings; and that **CROA 5000** can be distinguished as in that case, there was insufficient time for the parties to meet and agree on a JSI and the Award was also issued after the *ex parte* notice was given in this case.

[29] The Company further argued that a good faith effort was made by the Company in this case to agree on a JSI by way of the Company sending a proposed JSI to the Union and waiting over 30 days for a response; that it was the Union's failure to provide a response that resulted in an unwillingness to participate in the arbitration process in good faith; that there was no prejudice as sufficient time existed for the Union to have broached settlement or withdrawn the Grievance while waiting for the arbitration hearing to commence; and that as a discharge grievance, this type of grievance is to be given priority for CROA scheduling.

[30] It was the Company's position it had just cause to discharge the Grievor. It argued that employees can be disciplined for their off–duty conduct, and noted the factors to be met: *Millhaven Fibres Ltd. v Oil, Chemical, Atomic Workers Int'l Union, Local 9–670.* It argued there was a clear nexus between the Grievor's employment with CN and his criminal

[1] As amended November 2023

charges; that the Company was not required to wait for the criminal proceedings to conclude to take action to protect its employees; that the Grievor's continued employment was untenable considering the gravity of the charges, given the high degree of trust required *between* employees who work in unsupervised settings; that there was wide publication of the news articles with the Grievor's name and picture, which were easily accessible, as well as details of the heinous acts allegedly committed; that it had an obligation to protect its employees and cannot trust that the Grievor does not pose a risk to the safety of others; that it had a reputation of honesty, integrity and reliability to protect; that the bond of trust expected of the Grievor was breached; that it did not need to prove reputational harm had occurred, but only potential loss; and that the potential for reputational harm was 'plain and obvious', with fundamental impacts on the Grievor's reputation such that his continued employment was incompatible with the Company's legitimate business interests. It argued it was the Company's responsibility to mitigate risk, whether the Grievor had been convicted or not.

[31] The Company relied on **CROA 3311**, **4289**, **4650**, **4763** and **4860**; *Unifor Local 892 v. Mosaic Potash Limited Partnership* 2015 SKQB 391; and *Millhaven Fibres Ltd. v Oil, Chemical, Atomic Workers Int'l Union, Local 9–670.*

[32] The Union raised a preliminary objection regarding the manner and timing of the Company's referral of the grievance to arbitration. It argued the result in **CROA 5000** had very similar facts and the same result should occur in this case; that Agreement 4.16 provides for a window of 60 days for the Union to determine if it wishes to proceed to arbitration; that this time allows the parties to resolve the grievance and the Union to determine if it wishes to proceed to arbitration; that the 30 days for the parties to meet provides a further window of time for the Union to triage the Grievance; and that the Company failed to follow the correct steps of the grievance process and this has substantially interfered with the Union's administration of the grievance process and its representation. It argued there was no justification for doing so, as the Grievor was on inactive status and that the Company has interfered with the Union's determination of the priority of its grievances and wasted scarce CROA resources.

[33] The Union also argued the Investigation was not fair and impartial, as it was unreasonably delayed for six months, which prejudiced the Grievor, relying on **CROA 3011**, which it argued was followed in **CROA 4591** and **4638.** It argued that the conduct of the Investigation was also not fair and impartial, as the training logs were not provided prior to the Investigation commencing, as required by Article 82, resulting in an 'ambush' and unfairness: **CROA 3322**; **4558**, (upheld by the Saskatchewan Court of Appeal). It argued that this defect rendered the process *void ab initio.*

[34] Even if not, the Union argued the Company had not met its burden of proof, as the Company was required to establish both that the Grievor was aware of the requirements of the Code and that the Grievor violated that Code. It urged the Company has not satisfied either requirement, since the Grievor denied knowledge of the Code; did not recall receiving training on the document; and the training log was not sufficient to rebut the Grievor's statement that the Code was not brought to his attention. It argued there was no evidence the Grievor was informed that a violation could lead to his discharge.

[35] Even if it were established the Grievor was aware of the Code, the Union argued there was no requirement for the Grievor to make any report of the charges to the Company, as there was no evidence the charges "may affect CN's operations or reputation or impair [the Grievor's] ability to perform [his] duties". While the Company argued that the Grievor's charges "may" affect its reputation, there was no evidence to support that statement; there is no evidence the Grievor was known to be an employee of the Company by the public or anyone outside of the Grievor's family, and the news articles do not identify him as an employee of CN.

[36] The Union argued that an employee is entitled to be presumed innocent of criminal charges as a fundamental principle, while those charges are pending. In the further alternative, the Union argued the penalty of discharge is not appropriate and that several of the charges have already been withdrawn.

[37] In Reply, the Company noted that it had conducted a fair and impartial investigation; that the Collective Agreement does not establish a timeline by which an investigation must be conducted, that this was a complex case and there were many unknowns surrounding the Grievor's fitness to work that had to be considered before the investigation occurred;

and that any delay did not prejudice or interfere with the fair and impartial nature of the investigation, but gave the Grievor more time to comply with the Code. It argued the Union did not object to the training logs when they were introduced at the Investigation and cannot do so now; that there was no unfairness in recessing to produce the training logs, as the Company was surprised when the Grievor suggested he was not aware of the Code; that the Grievor had completed his training recently, so claiming to not know the Code is an example of him feigning ignorance and not being forthcoming; that it would raise concern if the Grievor would have answered the question differently had he remembered there were training logs which could contradict him; and that the Grievor was not being truthful, which is an aggravating factor for discipline.

[38] The Company also noted the Code could have easily been found by the Grievor whether he was on disability or not, as it is a public document; that the Grievor had a responsibility to know that document; that the warning from the Toronto Police regarding the Grievor was sufficient to establish reputational harm, and that the Company properly acted to protect its employees as required by the *Canada Labour Code* and its reputation.

[39] In its Reply, the Union argued the Company sent this Grievance to arbitration prematurely and has chosen to put this grievance ahead of other grievances the Union may have chosen to prioritize. The Union disputes that the Grievor was dishonest in the Investigation. It argued the off–duty conduct was unconnected with the Grievor's employment; that the provisions of the *Canada Labour Code* and *Criminal Code* referred to by the Company were not part of the Grievor's termination and are not relevant; that the Grievor has not been convicted of anything, and the Company cannot rely on the fact of the Grievor being charged; and that those charges have not affected the Company's reputation or impaired the Grievor's ability to perform his duties. It argued there was no evidence of reputational harm.

Analysis and Decision

[40] Dealing first with the preliminary objection, I cannot agree that the Company has not followed the steps to reach arbitration such that this case has "very similar facts" to **CROA 5000** and should reach the same result.

[41] In **CROA 5000**, the Company provided three days for the Union to agree to a JSI. That case found that this did not establish "good faith" efforts to reach a JSI, which are required by Article 10 of the CROA Agreement. *In that context*, it was noted that - had the Company properly applied to this Arbitrator under that Article - the matter could have been addressed appropriately outside of a CROA hearing and the parties could have been sent to take those "good faith" efforts.

[42] However, this case is not those facts. In this case, I cannot agree with the Union that the Company did not engage in "good faith" efforts to reach a JSI. Rather, it was the *Union* that did not respond to the Company's proposed JSI in a timely manner. The Company did not only give the Union "3 days", as in **CROA 5000**; the Union had more than a month to respond and failed to do so.

[43] In this case, *neither* party approached this Office for permission to file an *ex parte* Statements of Issue and *both* parties were required to do so before making that filing. When the Union had an issue with the Company proceeding *ex parte,* it could have – but did not – seek the assistance of the Arbitrator under the CROA Agreement, to protect scarce CROA hearing resources. It did not do so. Now that **CROA 5000** has been issued, should the parties have a complaint that 'good faith' efforts have not been made to reach a JSI, they are aware of the process that should be followed.

[44] Neither can I agree with the Union that it is the Union's prerogative to determine which Grievance proceeds to a hearing, or which grievance should be prioritized, and that the Company interfered with its ability to represent its members and prioritize which grievances to pursue.

[45] While a union owns a grievance in the ordinary course, it is the Collective Agreement that governs the relationship. In this particular case, Article 83.4 of the Collective Agreement provides that ***either*** party can refer a grievance to this Office for resolution. That request is to be made "within" 60 days from the date of the last step. It does not say that the decision can only be taken, "after" 60 days have elapsed, which is the Union's argument. Neither is there demonstrated prejudice. The Union retained the ability to enter into settlement discussions and withdraw the Grievance right up until the matter was heard.

[46] Turning to the Investigation, I cannot agree with the Union that the company was required to file into the Investigation the training logs *before* the Grievor was questioned about his knowledge of the Code, on the off chance that the Grievor would deny being trained. The Company was entitled to gather evidence in response to what I accept was an unusual answer from the Grievor, which was that he had not been trained on the Company's Code of Business Conduct. It was entitled to recess to obtain the training logs so they could be put to the Grievor to be addressed as part of the Investigation, when he denied that training.

[47] It was not unfair or impartial for the Company to do so. The training logs were the manner in which the Company was able to rebut the evidence which the Grievor gave about his lack of training on the Code. I am satisfied the training logs *are* sufficient evidence the Grievor was made aware of the Code. They were not required to anticipate the Grievor would be dishonest about that training.

[48] In law, there is a concept where an individual is found to either "know" or "ought to have known" of certain information, or certain obligations. It is up to the Grievor to review key documents for his employment and – if he chooses not to read and review the documents he is made aware of in training – it is no excuse to later suggest he did not know of the obligations upon him. I am satisfied the Grievor did receive training on the Code of Business Conduct and was aware of the document; and that the Grievor "knew or should have known" what that Code said, including his obligation to advise the Company when he was criminally charged.

[49] It is obvious from reviewing the transcript that this Grievor did not know and consider that the Company kept training logs which could establish he in fact did receive that training, before he chose to state he knew nothing of the Code. That he chose to be dishonest about this training was his choice.

[50] The Union also argued the delay was unreasonable. Whether a delay is reasonable or unreasonable is a question of fact, which will depend on context. In this case, the Grievor not only was charged with a violent and heinous crime, but he was also on disability, in a situation where there was a delay in medical information being provided. This was a

unique situation and I accept it was also a complex one for the Company to consider in determining how to respond.

[51] This is not an analogous case to **CROA 3011**, where there was a delay in advising an employee of the complaint of a female passenger, which could prejudice that employee in defending those allegations, as he was not aware of them. In that case, the grievor was unaware of those allegations until he was investigated.

[52] That is not these facts. In this case, the Grievor was well aware of the charges against him and the Union has failed to convince this Arbitrator there was any prejudice to him from the Company's delay in investigating his conduct. As the Company noted, if anything, that delay worked in the Grievor's favour, as it gave him further time to advise the Company of his situation.

[53] Neither can I accept that the charges did not have the ability to impact his employment, as argued by the Union.

[54] Context is important in considering this aspect of the argument. I agree with the Arbitrator's comments in **CROA 4650** that the crew of a train works largely unsupervised, and often in remote areas. Those employees work in unique roles and must – of necessity – travel together in close quarters. In this case, there is no guarantee the Grievor would have been off work indefinitely. Disabilities can – and do – change. The Company was not aware of when the Grievor would return to work and was entitled to consider that the conduct of which he was charged created a risk for not just its reputation, but the safety of its employees if he were to return.

[55] Whether or not the public was aware that the Grievor worked for the Company, the employees whom the Grievor worked with were certainly aware that he did, and that he had been accused of violent crimes, armed with a machete, a knife and brass knuckles. In this context, the Company has satisfied this Arbitrator that the Grievor's ability to perform his job duties could have been impacted when he must work in close quarters with other individuals unsupervised and was charged with violent offensives, and he was required to advise the Company of those criminal charges.

[56] This leads into a discussion of whether cause existed to discharge the Grievor.

[57] The Union has argued that the Company cannot act on charges alone, as there is a presumption of innocence.

[58] The Company provided two CROA authorities which were the only authorities filed by either party to address this particular issue. In both cases, the Company's decision to act to protect its employees and reputation *before* any criminal conviction occurred, was upheld. Both involved drug–related offences, which are not violent offences. Violent offences are more serious and disturbing to other employees with whom an individual works.

[59] In **CROA 4289**, Arbitrator Picher dismissed the Grievance of an employee whose home was the subject of a seizure of seven pounds of marijuana, 57 grams of cocaine and 93 codeine pills, as well as a quantify of magic mushrooms, with a street value of $70,000. The Grievor was initially charged with possession for the purpose of trafficking, which charge was later reduced to only possession. As in this case, news reports were made of the grievor's arrest and the charges against him. The Company did not await a conviction to act and the Grievor was dismissed for conduct unbecoming.

[60] While the charges were reduced to possession, that did not prevent Arbitrator Picher from determining that there was just cause to dismiss the Grievor. He found the Grievor had 'crossed a line' given the substantial quantities of drugs which were found, which "can only be seen as raising the inference that they were intended to be trafficked, presumably at a significant profit to the Grievor" (at p. 3). The Arbitrator held that "regardless of the good fortune he was able to bargain with the Crown in relation to a reduction of the charges against him to possession", the "elements which may drive a plea bargain do not necessarily come to bear in the assessment of appropriate discipline in the industrial employment setting" (at p. 4). He held that the context of the involvement of the employee in the "drug culture", meant that 'different considerations come to bear' (at p. 3).

[61] These conclusions were drawn, despite the lack of a criminal conviction, and despite the fact that the charges related to trafficking were withdrawn.

[62] The Arbitrator also applied **CROA 1703**, and approved the comments made in that case that there were "serious ramifications impacting on an employee's reputation" and that it

was not “unnatural to harbour concerns that the profit motive may cause the individual’s trafficking activities to spread into the workplace” (at p. 3).

[63] The Arbitrator held that the Grievor had “crossed a line moving beyond the mere possession or use of drugs into what I am satisfied was substantial involvement in drug trafficking” which “does pose a more substantial and serious concern for the employer’s legitimate business interests” (at p. 4). He then stated:

> In the instant case the Company takes a position that the grievor’s criminal activities were such as to irrevocably sever the bond of trust between himself and his employer. This Office is not in a position to reject or dismiss that very legitimate concern. On the contrary, I am satisfied that the grievor’s conscious decision to involve himself deeply in serious criminal activity relating to drug trafficking did break the bond of trust between himself and his employer, a high profile enterprise involved in a safety sensitive industry (at p. 4).

[64] The second decision is an earlier decision from 2002: **CROA 3311**. In that case, the police met a VIA employee at the station when they arrived and led him away for questioning. He was subsequently criminally charged for being part of a drug ring operating in Quebec involving the Hell’s Angels motorcycle gang. Forty–six people were arrested as a result of that operation. The Company suspended the grievor and a grievance was filed.

[65] In the investigation, the Grievor denied any guilt of the charges, which is similar to the Grievor in this case stating he believed all charges would be withdrawn.

[66] Once again applying **CROA 1703**, Arbitrator Picher stated:

> While Mr. Laroche is plainly entitled to the presumption of innocence *as regards his rights under the criminal law,* ***for the purposes of the law of employment the objective facts surrounding the charges against him raise substantial legitimate concerns.*** Media reports, in which his name **and photograph have appeared**, **have associated him**, as have the charges against him, with criminal gang activities allegedly conducted by the Hell’s Angels…in the Arbitrator’s view in the circumstances disclosed it is amply within the prerogative of the Corporation to protect its legitimate interests, including the safety of its passengers and its own reputation….the Company is not obliged to await a tragic accident or a

> scathing editorial before acting to protect its reputation (quoting from **CROA 1703**).

[67] These were the only two cases which addressed the issue of whether and how the Company could act when the Grievor is facing significant charges, but has not yet been convicted. These two CROA cases support the Company's ability to act, even if charges have not yet reached the stage of conviction, in an appropriate case.

[68] I consider that the facts in this case are more serious than either of these two decisions, as they involve not only allegations of violent conduct, but also objective evidence from the Toronto Police that the Grievor was dangerous. That is a sufficient to raise a risk for the Company, even more significant than the concerns raised in **CROA 4829** and **3311**, leading the Company to reasonably act to protect both its interests and its employees.

[69] However, even if I am incorrect that these CROA decisions did not provide a basis on which to find that charges alone can ground dismissal, that dismissal could also be substantiated based on *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union.* That case was decided in 1967, well before these CROA cases were considered and is the leading authority on off–duty conduct.

[70] *Millhaven Fibres* is also a discharge case. In that case, there were five factors listed, any one of which is sufficient to provide justifiable reasons for discharge: *Unifor v. Mosaic Potash* para. 15. The first factor is that the "conduct of the grievor harms the Company's reputation or product" (at p. 9), which the Company argued has occurred in this case. A further factor is reluctance of other employees to work with the Grievor.

[71] A word must be said about evidence when considering reputational harm. When conducting a jurisprudential review, the Court in *Mosaic Potash* focused on the following principles:

> a. The test is whether there is "potential for serious harm based on what a fair minded and well–informed member of the public might think about an employee's conduct**"** (at para. 62, emphasis added).
>
> b. "It is necessary to consider all the factors, *including the fact* that the off–duty conduct created risk, or that harm might arise in the future" (at para. 63, emphasis added); and
>
> c. An employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer can constitute grounds for summary dismissal. The

> employer need not prove actual prejudice in order to justify the dismissal (at para. 64, emphasis added).

[72] It is the "risk" and not the "actual prejudice" which is to be considered.

[73] It must be emphasized that context is important in considering reputational harm and also whether employees should reasonably be expected to work with a grievor charged with serious and violent criminal offences.

[74] There are several unique contextual aspects of this case.

[75] First, as already noted, the industry is unique, requiring running trades employees to work in close quarters, largely unsupervised and often in remote locations.

[76] Second, there was no indication in the evidence of when the Grievor may return to work, so the fact he was off on disability was not determinative.

[77] Third, the charges laid against the Grievor in the circumstances of this case are very significant, and involve a violent altercation which caused serious injuries through the use of a weapon. This is more significant than either of the situations considered in **CROA 3311** or **4289.** In this case, the Grievor was charged with possession of a knife, a machete and/or brass knuckles during this home invasion and the news reports indicated serious injuries resulted.

[78] Fourth, the Toronto Police's characterized the Grievor as "dangerous" when seeking the public's assistance in his capture.

[79] The Union argued that no members of the public knew about the Grievor's charges, as "only" the Grievor's family knew the Grievor worked for the Company. It pointed out it was not mentioned in this news reports who his employer was.

[80] This is not entirely correct, for two reasons: First, the Grievor's family are members of the public; and second, the *other employees* of the Company who worked with the Grievor *also* knew who he was and that he worked for the Company, and also that he was considered to be dangerous. Those individuals are also members of the public, as well as employees. For the Company not to take steps to protect the interests of those employees internally could potentially harm the Company's reputation *vis–à–vis* its own employees, as well as their families and friends who hear of that lack of action.

[81] The Union has argued the Company could have taken other actions, such as suspending the Grievor, while awaiting the criminal process.

[82] The jurisprudence supports that when reputational harm has been established – as it has in this case – the Company is given cause for *discharge.* The Company was not required to give the Grievor the "benefit of the doubt" on the facts of this case, given the serious and significant charges involving bodily harm and the fact the Grievor was considered to be "dangerous", which label was attached to him by a reputable organization even before he was convicted. It is difficult to think of a more significant situation which would draw the Company's action than when the Police label an employee to be "dangerous".

[83] Neither did the Grievor attract leniency through his answers during the Investigation. The Grievor stated he was not aware of the Code of Business Conduct, yet the evidence established he was trained on that Code, which training was satisfactorily established by the training logs. Not only had the Grievor received training, but it had taken place quite recently. While the Union argued the training logs were not descriptive, training logs are a well–accepted way that employers keep track of who has what training and when.

[84] The Company is entitled to rely on that evidence to establish the Grievor knew – *or should have known* – what was in the documents on which he was trained, and to have read those documents – on his own time, if necessary – to understand his obligations. As a business record, I have no reason to doubt the veracity of that evidence. It is no answer to suggest ignorance of that document. The Grievor failed to comply with that obligation at his own peril.

[85] The Grievor was dishonest in his Investigation, which was an aggravating factor supporting discharge, were one needed, which it is not. Even if *only ignorant* of his obligations under the Code, that would likewise be a significant aggravating factor, as he is required to be aware of important documents which apply to him, which the Code clearly did.

[86] That the Grievor suggested that being involved in a violent crime did not impact his ability to do his job – when that job involved being in tight quarters with other individuals who could be the subject of his anger and reactions – is clueless at best and disingenuous at worst. It would not be unreasonable for any employee not to want to work in close quarters

with an individual the Police have determined is “dangerous”, which is a further factor that can be considered under the *Millhaven Fibres* framework.

[87] As earlier noted, the test under that authority is what a “fair minded and well informed member of the public might think about the employee’s conduct”. In this case, I am satisfied the Company has established that a fair minded and well informed member of the public would consider the employee’s conduct – including the concerns of the Toronto Police expressed to the public – to have harmed the Company’s reputation and to have created a risk for its employees required to work with the Grievor and to therefore justify dismissal.

Conclusion

[88] The Employer had just cause to discharge the Grievor.

[89] The Grievance is dismissed.

I retain jurisdiction to correct any errors and to address any omissions to give this Award its intended effect.

May 17, 2024

CHERYL YINGST BARTEL
ARBITRATOR